SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 130.

POSTAL TELEGRAPH-CABLE COMPANY,
PLAINTIFF IN ERROR,

vs.

TONOPAH & TIDEWATER RAILROAD COMPANY.

No. 217.

THE WESTERN UNION TELEGRAPH COMPANY,
APPELLANT,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

No. 404.

POSTAL TELEGRAPH-CABLE COMPANY,
APPELLANT,

vs.

CHICAGO GREAT WESTERN RAILROAD COMPANY.

MOTION TO CONSOLIDATE.

Now comes Bynum E. Hinton, appearing on behalf of plaintiff in error, Postal Telegraph-Cable Company, in the first and last of the above-entitled causes, and moves the

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court to consolidate the said three causes to be heard when the first case, the Postal Telegraph-Cable Company *vs.* Tonopah & Tidewater Railroad Company, is reached.

The case of Postal Telegraph-Cable Company *vs.* Tonopah & Tidewater Railroad Company was an action brought in the Municipal Court of the City of New York, Borough of Manhattan, First Department, by the Telegraph Company for the recovery of seven dollars and thirty-two cents ($7.32), alleged value of services for transmission and delivery of certain interstate telegraph messages transmitted at the request of the Railroad Company.

The Railroad Company as defense to said action pleaded that on or about the 26th day of June, 1907, the plaintiff and the defendant entered into a contract in writing, whereby it was covenanted and agreed that the Telegraph Company should transmit telegrams and messages relative to the business of the Railroad Company, at the Railroad Company's request, without compensation, in consideration for certain free transportation to be furnished by the Railroad Company to the officers and employees and laborers of the Telegraph Company.

There was no issue of fact between the parties, the only issue involved being the validity of the contract in question, in view of the act of Congress of June 18, 1910 (U. S. Comp. Stat., Sec. 8563, Subd. 3), (which placed telegraph companies within the Interstate Commerce Act) as construed by the Interstate Commerce Commission in its ruling of March 28, 1916. (p. 22 of Record, 959.)

The court held:

> "This case, although involving only a small sum of money, involves a very important question of law. There is no conflict as to the facts, and hence that question of law stands out clear and distinct. It is whether the Interstate Commerce Act of Congress, as construed by the Interstate Commerce Commission in its ruling of March 28, 1916, is constitutional under the Constitution of the United States, as applied to

the contract in evidence in this case, between the plaintiff and defendant, made prior to the act of Congress of June 18, 1910, which placed telegraph companies within the Interstate Commerce Act. In other words, could an act of Congress constitutionally abrogate the so-called free telegraph service to be given by the plaintiff to defendant under the terms of that contract? I think that the contract is a bar to recovery in this suit, and that that provision of the Interstate Commerce Act as construed by the Interstate Commerce Commission, which prevents the rendering of the so-called free telegraph service by plaintiff to defendant in accordance with such contract is unconstitutional and accordingly I direct judgment for the defendant." (p. 40, Record, 402.)

This judgment was affirmed by the Supreme Court and Appellate Division of the State of New York, and comes to this court on writ of error.

The case of Western Union Telegraph Company *vs.* Baltimore & Ohio Railroad Company was a suit brought in the United States District Court for the Southern District of New York by the Baltimore & Ohio Railroad Company against the Western Union Telegraph Company on a bill in equity praying adjudication (1st) that a certain contract between the parties, made October 15, 1887, is lawful and binding; (2d) that the Telegraph Company be required specifically to perform the contract; and (3d) that the Telegraph Company be perpetually enjoined from violating the contract. The prayers of the petition were granted by the district court and this decree was affirmed by the United States Circuit Court of Appeals for the Second Circuit, from which court the case comes here on appeal.

The Circuit Court of Appeals said with reference to the issue involved that:

"The sole question presented in argument or by assignment of error is whether under the Act to Regulate Commerce, as amended June 18, 1910, it is lawful for railway and telegraph companies to observe

the terms of a contract made between them (and lawful when made) long before passage of the statute referred to."

The case of the Postal Telegraph-Cable Company, appellant *vs.* Chicago Great Western Railroad was brought in the United States District Court for the Northern District of Illinois by the Chicago Great Western Railroad Company against the Postal Telegraph Cable Company on a bill in equity praying adjudication (1st) that certain contracts between the parties, made December 26, 1888, and February 5, 1902, are lawful and binding; (2d) that certain suits at law then pending in the Municipal Court of the City of New York and in the Appellate Division of the Supreme Court of New York, between the complainant and the defendant, be stayed during the pendency of the proceedings, and permanently, and that said defendant be also restrained during the pendency of those proceedings, and permanently, from bringing further suits against the complainant for the collection of telegraph tolls, and (3d) that a mandatory injunction be entered requiring the Telegraph Company to continue to furnish the complainant the telegraphic service provided for in said contracts.

The prayers of the petition were denied and the bill dismissed by the district court. This action was reversed by the Circuit Court of Appeals, and the case remanded with instructions to grant the prayers of the bill. The Circuit Court of Appeals followed the decision of the Circuit Court of Appeals for the Second Circuit in the above case of the Western Union Telegraph Company *vs.* Baltimore & Ohio, stating that they found no additional facts that in their judgment enlarged or changed the questions for decision. From this action of the Circuit Court of Appeals for the Seventh Circuit the case was appealed to this court.

During the last term of this court, while the case of the Postal Telegraph-Cable Company *vs.* Chicago Great Western Railroad was still pending before the Circuit Court of Ap-

peals of the Seventh Circuit, a motion to advance was made in the case of the Western Union Telegraph Company *vs.* Baltimore & Ohio Railroad Company, to which motion to advance objection was made by the Postal Telegraph-Cable Company, on the ground that both cases called in question the validity of the same ruling of the Interstate Commerce Commission, and that the hearing in the Western Union case should be delayed until the Postal Telegraph-Cable Company case was before this court; in order that the two cases might be heard together; and stating that as soon as the record in the Postal case was before this court that it would gladly join in any request for an early hearing. Said motion to advance was denied by this court without prejudice.

As will appear from the foregoing, all three cases involve the same question; namely, the validity of the ruling of the Interstate Commerce Commission of March 28, 1916; and this application to consolidate them is made by virtue of subdivision 8 of rule 26 of the rules of the Supreme Court, which provides that two or more cases, involving the same question, may, by leave of court, be heard together.

Respectfully submitted,

BYNUM E. HINTON,
Attorney for Postal Telegraph-Cable Co.